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No. 979

In the Supreme Court of the United States

OCTOBER TERM, 1966

DOUGLAS A. SMITH, *Petitioner,*

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

Petition for a Writ of Certiorari to the Superior Court of the State of California in and for the County of Marin, Appellate Department

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Douglas A. Smith petitions for a writ of certiorari to review the judgment of the Superior Court of the State of California in and for the County of Marin, Appellate Department, entered in this case on November 18, 1966.

OPINIONS BELOW

The judgment of the court below (Appendix, *infra*, p. 11) is not officially reported. The trial court—the Municipal Court, Central Judicial District, County of Marin, State of California—entered a Memorandum Opinion upon peti-

tioner's motion for a new trial, which is also not officially reported, and is reprinted in the Appendix, *infra*, pp. 4-10.

JURISDICTION

The judgment of the court below was dated and entered on November 18, 1966 (Appendix, *infra*, p. 11). On November 30, 1966, the court below issued the remittitur to the trial court. Thereafter, on December 5, 1966, petitioner filed a motion for the recall of the remittitur, a motion for extension of time for the purpose of applying for a certification to the California District Court of Appeal, together with supporting papers (Appendix, *infra*, pp. 12-18). On December 20, 1966, the court below entered its order denying the motions for rehearing and an extension of time for applying for a certification of the proceeding to the District Court of Appeal (Appendix, *infra*, p. 19).[1]

The jurisdiction of this court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

Whether the doctrine of *Thompson v. City of Louisville*, 362 U.S. 199—that a state court conviction unsupported by any evidence is invalid under the Fourteenth Amendment to the United States Constitution—is applicable where the only testimony introduced to support a conviction is completely nullified and destroyed by the evidence in the record considered as a whole.

STATUTES INVOLVED

The following constitutional provisions, statutes and rules of court are involved in this proceeding, and are set forth in the Appendix, *infra*, pp. 1-3.

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1. The certification procedure, provided for by the Appellate Rules of the California Rules of Court, is discussed *infra*, pp. 9-10.

Fourteenth Amendment to the United States Constitution
California Penal Code, Section 602(j)
California Penal Code, Section 1466
California Code of Civil Procedure, Section 77 (a) and (g)
Rules 62(a), 63(a) and (b) of Appellate Rules, California Rules of Court

STATEMENT OF THE CASE

Petitioner was convicted by the trial court, sitting without a jury, of a violation of Section 602(j) of the California Penal Code, which forbids trespass upon lands "for the purpose of injuring any property . . . or with the intention of interfering with, obstructing, or injuring any lawful business . . ." The finding upon which the conviction rests is that petitioner either threw, or aided and abetted someone who threw an explosive device into a room where strike-breakers were at work behind a labor union picket line, which device emitted a large volume of smoke and caused fire damage to the premises. No one was injured.

A. The evidentiary facts adduced at the trial.

Petitioner is the President of San Francisco-Oakland Mailers Union, Local No. 18 (Tr. 114).[2] On October 25, 1965, a labor dispute developed between this Local Union and the publisher of the Marin Guide Publications, a group of community newspapers published in Marin County, California. When members of the Union appeared for work on that evening, the publisher, Harry Johnson, asked

2. The designation "Tr." denotes the transcript of the testimony at the trial, as well as the transcript of subsequent proceedings before the Trial Court, all of which is paginated consecutively.

them to leave the premises, and stated that he was severing his relationship with the Union (Tr. 115, 138-139). The Union "declared a lockout", and established a picket line at the Marin Guide's plant in Sausalito, California (Tr. 115). Members of other labor organizations who were employed by Marin Guide walked off their jobs in sympathy (Tr. 117, 136-137).

The following evening the Union's picket line was extended to another location owned by Mr. Johnson—200 Shore Line Highway in Mill Valley, California—where mailing work was being performed by a number of persons, principally teenage boys, hired to replace the members of the Union who had been refused employment the previous day (Tr. 9-10). The picket line was established at these premises by petitioner and the Local Union's Secretary, Dwayne Jones, shortly after 10:00 P.M. (Tr. 118). During the course of the evening a large number of union sympathizers, including union members who worked at other plants, joined the picketing (Tr. 118, 137, 142). Actual picketing was carried on by twelve or fifteen persons, but the total number of persons present in the area of the picketing was estimated by differing witnesses to be, variously, from 40 to 80 (Tr. 118, 10, 142).

Sometime between 11:30 P.M. and midnight, while the picketing was in progress, an explosive device was thrown into a back room at 200 Shoreline where a group of boys and Mr. Johnson were folding newspapers, readying them for stuffing into mailbags (Tr. 14-15). Smoke and flames filled the room, which was quickly evacuated (Tr. 15-17, 67, 86-87). No one was injured, and firemen arrived to extinguish the flames (Tr. 91).

The testimony which bears upon petitioner's alleged implication in the throwing of the explosive object may be summarized as follows:

1. *Testimony of Harry Johnson*—Publisher Johnson testified that sometime after 11:30 P.M. he observed petitioner "crouched down" in a doorway leading to an adjacent room, looking into the room where Johnson and a group of boys were working (Tr. 14-15). Johnson stated that he "turned and started to say something . . . But before I could even open my mouth I seen this arm stick out through the right-hand side of the opening of the door and this bomb thrown through or object was thrown through and smashed against this wall and started spewing some sort of a liquid and burst into flames" (Tr. 15). Johnson added that he saw no more than the arm of the man who threw the explosive and that he "cannot honestly swear that this was [petitioner] that was throwing it. All I can say is the man who threw this thing had a topcoat on and a felt hat and glasses" (Tr. 16). Johnson admitted that, sometime later, he published in the Marin Guide a retraction of a story accusing petitioner of the act of throwing the explosive, stating in the retraction that he was not accusing or charging any specific person of having thrown it (Tr. 36).

Johnson testified that after the room filled with smoke he waited for the last of the boys to leave, and then ran into the hallway, where he brushed up against someone whom he quickly thereafter realized was petitioner (Tr. 17). He then turned, according to his testimony, and caught up with petitioner, grabbed him, but the two were separated by others in the area (Tr. 18, 20). Johnson stated that he immediately returned to the room where he had been, to make certain that everyone was out, and finally "made my way back to the front of the building and accused [petitioner] of trying to kill us" (Tr. 21).

2. *Testimony of John McLeroy*—This witness testified that at the time of the explosion he was working in a room

across the hall from the room where the explosive was thrown (Tr. 60). According to Mr. McLeroy, he heard someone shout "fire", whereupon he ran into the hall, and saw an employee named Mike Healy, petitioner and Mr. Johnson (Tr. 62). Petitioner was wearing a dark overcoat, but not a hat, according to McLeroy (Tr. 63). He also saw two other men coming out of the room from which the explosive was thrown, and into a breezeway area just outside the hall (Tr. 64).

3. *Testimony of Thomas Driskill*—Thomas Driskill was one of the teenage boys who was working in the room where the explosive was thrown. Driskill testified that when the object landed in the room, he ran into the hall, and out an exit door to the breezeway area outside the building, and that he saw petitioner while passing through the hallway (Tr. 68). He identified the Union's secretary, Dwayne Jones, as being with petitioner at the time (*ibid*). In his testimony, Driskill stated that he was about two feet from petitioner when he saw him, but he told police officers during the investigation of the incident that he was about 15-20 feet away from Smith at this time (Ct. Exh. 1).

4. *Testimony of Mike Healy*—Mr. Healy was the editor of the Marin Guide, and was working in the same room across the hall as was John McLeroy when the incident occurred (Tr. 203). Mr. Healy testified that upon hearing noise and confusion across the hall, he ran to the doorway of the room where the explosive was thrown, and saw smoke and flames (Tr. 203). According to Healy, the room was empty, and he returned to the place where he had been working, and told everyone to leave the building (Tr. 204). He returned to the hall to close the door where the smoke and flames were located, and then went outside the building "to the picket line directly to Jim Harris [a picket]

and said "Now look what you have done. You have ruined the paper . . ." (Tr. 204). Healy testified without contradiction that petitioner was standing "off to the side, . . . or behind [Harris]" (*ibid.*) Healy also stated that between "seven, eight minutes, eight or nine minutes" elapsed between the time when he first heard the confusion from the room where the explosive was thrown, and when he spoke to Harris on the picket line (Tr. 211).

5. *Testimony of Eric Rosse*—Eric Rosse, a witness for the prosecution, was another of the teenage boys working in the room where the explosive was thrown. Rosse testified that he shouted "bomb" when the object landed in the room, immediately ran into the hall, and on out the exit door to the area of the breezeway, where he saw two men walking away from the building (Tr. 87). He stated that he did not recognize either, "But I know it wasn't [petitioner]" (Tr. 88). Rosse added that he saw petitioner "in the crowd" in front of the building when he arrived there (*ibid.*).

6. *Testimony of defendant's witnesses*—Petitioner testified on his own behalf, and seven other witnesses, all of whom were engaged in the picketing activities outside the building when the explosive was thrown, were also presented for the defense. Petitioner denied having entered the building at any time prior to the throwing of the explosive, and stated that he was on the picket line in front of the building at the time of the incident (Tr. 119, 120). The remaining defense witnesses similarly testified that they observed petitioner on the picket line at the time when the explosive was thrown (Tr. 145-146, 157, 168-169, 178, 185, 191, 198). Petitioner also stated that he was standing next to James Harris when Mike Healy confronted them immediately following the throwing of the explosive, and that Healy invited Harris to come in the building to inspect the damage

(Tr. 122, see also 157, 204). Petitioner asked if he could accompany Harris, and the three approached the building. Harris and Healy went inside, but petitioner found the smoke intolerable, and returned to the picket line without entering the building (Tr. 123). While walking back to the picketing area, Johnson came up from behind petitioner and pushed him, shouting that petitioner and the other pickets should stay off his property (Tr. 123-124).

B. The decision of the trial court.

At the conclusion of the trial, the court ruled as follows (Tr. 241):

> "There is no reasonable doubt in my mind but that [petitioner] was in the room when the bomb was thrown and that [petitioner] either threw it . . . or that [petitioner] aided and abetted the person who did throw it. Accordingly, the Court finds [petitioner] guilty on both counts of the complaint."

Petitioner was subsequently sentenced to serve six months in the county jail, and to pay a fine in the amount of $500.00 (Tr. 274). The sentence was imposed upon the first count of the complaint only, whereupon the second count was dismissed upon motion of the District Attorney (Tr. 271).[3]

C. Proceedings subsequent to the trial.

A timely appeal was taken from the conviction to the Appellate Department of the Superior Court of the State of California in and for the County of Marin, where, on

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3. The first count of the complaint alleges an unlawful entry for the purpose of injuring the property rights of the complaining witness, Harry Johnson. The second count alleges an unlawful entry on Johnson's property with intention of interfering with his business.

November 18, 1966, the judgment of conviction was affirmed without opinion (Appendix, *infra*, p. 11). The remittitur thereafter issued to the trial court. Prior to execution of the sentence, however, petitioner filed a motion to recall the remittitur, a motion for rehearing, and a motion for an extension of time to apply for certification of the case by the Appellate Department to the District Court of Appeal (Appendix, *infra*, pp. 12-14). On December 20, 1966, the motions for rehearing and for extension of time to apply for certification of the case to the District Court of Appeal were denied, again without opinion (Appendix, *infra*, p. 19).

REASONS FOR GRANTING THE WRIT

1. The judgment of the Appellate Department of the Superior Court is a final decision of the "highest court of a State in which a decision could be had" in this case (28 U.S.C., Section 1257) and is therefore properly before this Court for consideration on its merits. Under California law, an appeal from a municipal court in a criminal case must be taken to the superior court. California Penal Code, Section 1466. An appellate department is required to hear such appeals in superior courts for counties which have one or more municipal courts. California Code of Civil Procedure, Section 77. There is no appeal of right beyond the appellate department of the superior court. *Lucey v. Municipal Court*, 65 C.A.2d 228, 231, 150 P.2d 549. The Appellate Rules of the California Rules of Court, however, provide for transfer of a case by the appellate department of a superior court to the District Court of Appeal by certification. Thus, under Appellate Rule 63, certification may take place upon the Appellate Department's own motion, or a party may apply to the Appellate Department for certification. Under Rule

62, the District Court of Appeal may order a case transferred to it on its own motion. The Rules provide that the purpose of this discretionary procedure is "to secure uniformity of decision or to settle important questions of law." Rules 62(a), 63(a).

In the present case concurrent applications were made to the court below, following its affirmance of the conviction, for rehearing and for an extension of time in which to request certification of the case to the District Court of Appeal (Appendix, *infra*, pp. 12-14).[4] In support of the latter motion, petitioner filed a memorandum of points and authorities urging that further review was necessary to settle an "apparent conflict" in decisions, and that the case also presented an "important question of law" (Appendix, *infra*, p. 18). In these circumstances, the denial of the motion, considered with the concurrent denial of the motion for rehearing constitutes a rejection of the request for certification of the case to the District Court of Appeal. The judgment below is thus a final decision of the highest California court in which petitioner is entitled to review of his conviction.

2. It is settled law that, "Just as 'Conviction upon a charge not made would be sheer denial of due process,' so is it a violation of due process to convict and punish a man without evidence of his guilt." *Thompson v. City of Louisville*, 362 U.S. 199, 206. See also *Barr v. City of Columbia*,

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4. Appellate Rule 62(b) provides that the application for certification must be made before the judgment of the appellate division becomes final, i.e., seven days after entry. The order of affirmance in the present case became final on November 25, 1966 (See Appendix, *infra*, p. 11). The motions described in the text were filed on December 5, 1966 (Appendix, *infra*, pp. 12-14). The declaration of counsel in support of the motion for extension of time shows that the clerk of the Superior Court had mailed the notice of the November 18, 1966 order to an erroneous address, and that motions were filed forthwith upon actual receipt of the notice (Appendix, *infra*, pp. 15-16).

378 U.S. 546, 551; *Garner v. State of Louisiana,* 368 U.S. 157, 163. There is no reason for not applying this principle in circumstances where the cogency of testimony upon which a conviction rests is wholly destroyed by the evidence on the record considered as a whole. A record devoid of evidence should not differ, for purposes of Constitutional protection, from a record which precludes rational acceptance of testimony introduced to support a conviction. This is not to say that the sufficiency of evidence to sustain a conviction is a Constitutional question, or that this Court must weigh the evidence in a criminal case to determine whether the requirements of the Fourteenth Amendment have been satisfied. Due process, however, cannot fairly be applied to forbid convictions in the absence of evidence without also forbidding convictions resting on evidence which, by minimum standards of a fair trial in our system of jurisprudence, is fatally deficient.

The record in the present case does not measure up to minimum Constitutional requirements in this respect. Thus, the conclusion that petitioner either threw or abetted in the throwing of the explosive device into the room where the strikebreakers were working rests primarily upon publisher Johnson's testimony that he saw petitioner immediately before the device was thrown, and that he again saw petitioner in the hall outside the room upon leaving it. Thomas Driskill and John McLeroy also testified that they saw petitioner in the hall during the period that the room was being evacuated. The record, however, precludes acceptance of this testimony. It is impossible, upon a consideration of the prosecution's case as a whole, that petitioner could have been in the hallway immediately after the explosion. Editor Mike Healy, a witness for the prosecution, was also in the hallway at this time, and though he saw Johnson, he did not see petitioner there (Tr. 209). Healy did see

petitioner, however, standing next to Jim Harris on the picket line as soon as Healy left the building and went to the area of the picketing. Petitioner could not have been on the picket line when Healy arrived there, and also in the hall where Johnson, Driskill and McLeroy said they saw him.[5]

Along with Healy, one other prosecution witness, Eric Rosse, was also in the hall immediately after the explosion. Rosse testified without equivocation that petitioner was not there at the time (Tr. 89). Consistent with Healy's testimony, Rosse also stated that petitioner was standing "in the crowd" in front of the building when Rosse arrived there after running out of the building (*ibid.*).

The testimony of Johnson and Driskill, moreover, is irreconcilable. Driskill stated that he was first out of the room where the explosive was thrown, and encountered petitioner exiting from the building (Tr. 67-69). Johnson, on the other hand, testified that he was the last out, and that he also brushed by petitioner at the same place (Tr. 17-18). If petitioner had been walking to the front of the building, as Driskill testified, he could not have been at the exit door where Johnson said he subsequently encountered him.

As stated *supra*, pp. 5, 6, both Driskill and Johnson made statements prior to the trial which were inconsistent with their testimony. Driskill's identification of Dwayne Jones as having been with petitioner at the exit of the hallway immediately after the explosive was thrown is also inconsistent with Jones' testimony, which was apparently credited by

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5. Manifestly, Healy's estimate that seven to nine minutes elapsed between the explosion and his departure from the building is inherently impossible (Tr. 211). In the emergency situation that existed, it is obvious that a great number of events transpired very quickly, indeed, simultaneously, which might well tend to extenuate the period of time in an uncritical reflection by a person involved in all that happened.

the trial court.[6] On the other hand, Johnson's testimony is fully explained by the animosity he felt against petitioner in connection with the labor dispute.

In sum, the internal inconsistencies of the prosecution's case have the cumulative effect of cancelling out whatever testimony which, standing alone, might tend to implicate petitioner in the throwing of the explosive. The prosecution succeeded only in placing petitioner in a variety of different places during the critical moments following the explosion. Evidence that a defendant is in two places at one time is scarcely different, in evaluating the validity of a conviction, than no evidence at all. The principle of due process cannot countenance a conviction on a record of this kind.

3. The question presented is one of importance in the administration of criminal justice, has not been treated in previous decisions of this Court, and therefore warrants consideration.

CONCLUSION

For the reasons stated, this petition for certiorari should be granted.

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January, 1967.

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6. Jones stated that he was in the area of the picketing at all times prior to the explosion (Tr. 145-146). The trial court observed, following argument on motion for a new trial, that the testimony of the persons on the picket line to the effect that they saw petitioner in the area of the picketing at all times "is substantially correct," and added that the court was "not in any way implying that [the defense] witnesses are not being truthful to the best of their ability" (Tr. 263). The court also surmised, however, "that there must have been moments while they were picketing when [petitioner] was out of their view" (Tr. 263).

(Appendix Follows)

Appendix

The Constitutional, and statutory provisions, and the Rules of Court which are involved in this case are, in applicable part, as follows:

Fourteenth Amendment to the United States Constitution

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 602(j) of the California Penal Code

Section 602. Trespasses constituting misdemeanors; enumeration.

Every person who wilfully commits any trespass by either:

• • • • • • •

(j) *Purpose to injure.* Entering any lands, whether unenclosed or enclosed by fence, for the purpose of injuring any property or property rights or with the intention of interfering with, obstructing, or injuring any lawful business or occupation carried on by the owner of such land, his agent or by the person in lawful possession;

Section 1466 of the California Penal Code

Section 1466. Judgments and orders appealable; people; defendant.

An appeal may be taken from a judgment or order of an inferior court, in a criminal case, to the superior court of the county in which such inferior court is located, in the following cases.

• • • • • • •

2. By the defendant:

(a) From a final judgment of conviction . . .

Section 77 of the California Code of Civil Procedure

Section 77. Appellate department of superior court; composition; designated judges; decisions; transaction of business; jurisdiction and powers; procedure.

(a) There is an appellate department of the superior court in every county and city and county which has one or more municipal courts.

* * * * * * *

(g) Every appellate department under this section shall have jurisdiction on appeal from the municipal and justice courts within the county or city and county in all cases in which an appeal may be taken to the superior court as is now or may hereafter be provided by law, except such appeals as require a retrial in the superior court. The powers of each appellate department shall be the same as are now or may hereafter be provided by law or rule of the Judicial Council relating to appeals to the superior courts.

Appellate Rules California Rules of Court

Rule 62. Transfer

(a) A District Court of Appeal may order a case transferred to it for hearing and decision when the superior court certifies or the District Court of Appeal on its own motion determines from an opinion of the appellate department published or to be published in Advance California Appellate Reports that such transfer appears necessary to secure uniformity of decision or to settle important questions of law.

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Rule 63. Certification

(a) The Superior court on application of a party or on its own motion may certify that the transfer of a case to the

District Court of Appeal appears necessary to secure uniformity of decision or to settle important questions of law. . . .

* * * * * * *

(b) Any party may apply to the superior court for the certification of a case after judgment in that court. If there was no trial in the superior court such application shall be served and filed before the judgment on appeal becomes final as to that court and may be included in any petition for rehearing. . . .

In the Municipal Court, Central Judicial District,
County of Marin
State of California

No. CR 27618

The People of the State of California,
Plaintiff,

vs.

Douglas A. Smith,
Defendant.

MEMORANDUM OPINION

The defendant was adjudged guilty after a court trial, and he has moved for a new trial. Because of certain unique features of the case the court has re-examined it from the vantage point of a typewritten record and certain documents provided by the district attorney (these documents will be marked as a court exhibit and made a part of the file). Three fundamental questions raised by the motion were considered.

First, is the testimony of the prosecution witnesses internally consistent? *Second,* was any evidence overlooked which, when considered in the context of the entire record, creates a reasonable doubt? *Third,* is there evidence outside of the record which defense counsel was not aware of or, through oversight, failed to bring to the court's attention and which was "material to the defendant"? (Pen. Code § 1181 (8). In this connection the court was concerned over the defense argument that "if the district attorney were that concerned about the undisputed testimony, it is surprising that he did not prosecute under an arson charge" (R.T. 225). The implications in such a statement are of significance when related to the prosecution argument that

it was the defendant "who threw the bomb and therefore is guilty of this crime" (R.T. 225) and that the defendant "indeed was the person who threw the bomb" (R.T. 240).

Thus, the court was asked to base a conviction in this case on a finding that the "bomb" represented the "interference" or "injury" intended at the time of the trespass (Pen. Code § 602 (j). In other words, the prosecution contends that the requisite specific intent to injure or interfere was manifested by the throwing of the bomb.

Accordingly the court was concerned, particularly in light of its sentencing function, that the prosecutive decision to proceed under section 602 (j) (trespass) rather than section 448 (a) (arson) might be related to the credibility of witnesses rather than to the myriad of other factors which would—in the public interest—justify prosecution for the less serious offense.

False or distorted testimony pollutes a prosecution for misdemeanor as much as a prosecution for felony. The defense contends that a key prosecution witness (who corroborates the complaining witnesses) "volunteered perjury". (R.T. 230) During defense counsel's argument and on the motion for new trial he urged that this witness made inconsistent statements to the police at the time of the incident. Yet, the fact is that the defense did not call any impeaching winess nor did it offer to prove any prior inconsistent statement (written or oral) of this or any other witness called by the prosecution. Moreover, no affidavit has been filed pursuant to section 1181 (8) of the Penal Code which would support the contention that an impeaching witness would or could be produced for a new trial (see Witkin Crim. Proc. p. 568 et seq. and *People v. Williams* 1962 57 Cal. 2d 263).

Reference has been made by the defense to certain police reports and the court agreed to examine them before ruling

on the motion for new trial. These police reports contain summaries of what certain persons are purported to have communicated to investigating police officers at the time of the incident. Curiously, investigating officers neglected to obtain signed statements from any witness although at least four (including three of the prosecution witnesses) volunteered information. Assuming the pre-trial availability of these police reports to the defense, the issue of whether or not witnesses called by the prosecution made prior inconsistent statements to police officers should have been explored at the trial. The reports themselves are inconclusive and this court declines to speculate or conjecture on what a police officer or other witnesses might have testified had he been called. If the defense has relied upon innuendo, when it could have relied upon fact, the trial court cannot fill the void by indulging in speculation.

With the proceedings in their present posture I must conclude that the defendant has had the benefit of effective aid of counsel and that there is no newly discovered evidence. However, these issues—if they exist—are never foreclosed by the trial court's ruling on a motion for new trial.

The first and second issues referred to above must be resolved by examination of the reporter's transcript. Section 1181 (6) of the Penal Code provides that a new trial should be granted if a verdict or finding is contrary to law or evidence. (No error of law is claimed by the defense.) Accordingly the court has reweighed the evidence.

Both the complaining witness and a corroborating witness placed the defendant in the room from which the "bomb" was thrown. The former testifies that he saw the defendant "crouched" at the door dividing the two rooms a moment before the "bomb" was thrown, that he turned away for a second and that as he turned back he observed someone dressed like the defendant and at the very place

where the defendant had been "crouched" throw the object which turned out to be the bomb. He states that he observed the extended arm of the person throwing the "bomb", but that the arm covered the face of the thrower. He also testifies that the thrower of the bomb had had on the same color topcoat as the defendant whom he had seen a moment earlier. The corroborating witness asserts that he observed the defendant exiting from this same room seconds later. A third witness observed the defendant just outside the building's main exit heading in the direction of the picket line. The defendant testifies that he was on the picket line at the time the missile was thrown, but that he entered the building with the permission of an employee of the picketed establishment. Thus, although the defendant admits being on the premises several minutes after the "bomb" was thrown, he denies that he was there at the time or seconds later. He acknowledges that he suffered the effects of the smoke resulting from the throwing of the bomb, but explains this by saying that this was a consequence of his going on the premises several minutes later at the invitation of the employee. At least one defense witness observed the defendant suffering the effects of the smoke. (See R.T. 186)

The employee who assertedly invited the defendant to inspect the damage denies that he either invited or authorized the defendant to go onto the premises and further denies that he saw the defendant on the premises several minutes later. He does state that he authorized one James Harris to inspect the damage and that James Harris, rather than the defendant, went into the building with him. The circumstances surrounding the incident itself weigh heavily in the court's decision. The defendant, president of a local union, went to the picketed establishment in the belief that two of his members had been assaulted earlier in the evening by strike breaking youths. Placing no reliance what-

soever on the ability of local law enforcement agencies to maintain order, he authorized a large turn out of pickets. By midnight there were upwards of forty pickets at the scene (R.T. 142, the complaining witness puts the number at eighty, R.T. 47):

The defense justifies the large number of pickets by asserting that union officials observed "people on the phone" and "we knew they were talking to somebody and we assumed it was more people who we figured that we were going to help (sic) because there was only three of us and part of the time five of us, and there had been people, as far as we knew, attacking them earlier in the evening, so more people were arriving for our side . . ." (R.T. 142). It is not clear just how the union would know that the telephone was being used and for what purpose unless its members were in fact trespassing. The secretary-treasurer of the defendant's local left no doubt respecting the acrimonious and explosive nature of the situation. Among other things, he testified that "we figured that we would have the pickets in front and if something happened, we would have the support that would be necessary. *We were just trying to take care of our own.*" In sum, the defendant had determined to solve the problem of violence in his own way rather than by calling upon law enforcement to give his employees the protection to which they were entitled.

By the same token the prosecuting witness is at fault for allowing the situation of that evening to degenerate. Even when there were, by his count, as many as eighty pickets, with alleged tampering with mail bags, continual trespassing and blocking of vehicles, he did not request police assistance. (R.T. 47) Considering the tender ages of the strike breakers, it is difficult to characterize the employer's conduct as other than reckless.

However, the backdrop painted by the defense explains what finally occurred, and evidence of the defendant's motive has been spread upon the record. No one suggests that the employer, or any employee of the picketed premises, threw the bomb. As a matter of fact, even the defense seems to assume that some member of one of the picketing unions was responsible.

> "Q. Did you know that any member of the union were going to throw a bomb in there?
> A. No sir." (R.T. 124)

During the course of the trial the defense implied that the court's decision would influence the outcome of the labor dispute. This court has no opinion and is entitled to none, respecting the merits of the dispute itself. It is clear, however, that both sides were willing to let the situation deteriorate. The employer and the union leadership acted recklessly and without due regard for the welfare of those who followed their leading. The evidence indicates that both sides anticipated violence. They were not disappointed. The throwing of the bomb was a cowardly and horrendous act, and it is a miracle that no one was killed or seriously injured.

The victim of this transgression is not just the complaining witness or his publication. Primarily it is the community that has been victimized. The fact that the complaining witness must share the moral responsibility for the lawless atmosphere of that evening does not imply that the wrong doer should go unpunished when responsibility can be properly fixed. The temptation to say, "a plague on both their houses" is great, but this is a government of laws and not of men, and when one takes the law into his own hands, thereby violating it, and it is established beyond a reason-

able doubt that he has done so, he must suffer the consequences. The motion for a new trial is denied.

Dated Feb 3 1966

ALVIN H. GOLDSTEIN, JR.
Alvin H. Goldstein, Jr.
Judge of the Municipal Court

Appellate Department
In the Superior Court of the State of California
in and for the County of Marin

No. 2425

People of the State of California
Plaintiff

vs.

Douglas V. Smith
Defendant.

This action having heretofore been submitted on October 18, 1966 after hearing on appeal from the Judgment rendered in the Municipal Court, Central Judicial District, in and for the County of Marin:

It is hereby ordered, adjudged and decreed that the Judgment of the Municipal Court be and the same is hereby *AFFIRMED.*

JUDGES CONCURRING: ALL

Dated: November 18, 1966

THOMAS F. KEATING
Thomas F. Keating

SAMUEL W. GARDINER
Samuel W. Gardiner

HAROLD J. HALEY
Harold J. Haley

In the Superior Court of the State of California
in and for the County of Marin
Appellate Department

No. 2425

The People of the State of California,
Plaintiff and Respondent
vs.
Douglas A. Smith,
Defendant and Appellant

NOTICE OF MOTION AND MOTION FOR RECALL OF REMITTITUR

To: The Honorable Superior Court of the State of California, in and for the County of Marin, Appellate Department; the Honorable Bruce Bales; Clerk of the Superior Court, County of Marin:

Please Take Notice that on a date to be designated by the Court the Defendant in this matter will move the Superior Court, Appellate Department, located at the Courthouse, City of San Rafael, County of Marin, State of California, for the recall of the remittitur issued by this Court.

This motion is based upon this notice, on the papers, records, and pleadings on file herein, the attached declaration of Socrates Mamakos submitted herewith, and by this reference made a part of this motion, together with such other evidence, oral or documentary, as may be entered at any hearing ordered by the Court on this motion.

Dated this 5th day of December, 1966.

SOCRATES MAMAKOS
By ROGER P. GARETY
Roger P. Garety
Attorneys for Defendant

In the Superior Court of the State of California
in and for the County of Marin
Appellate Department

No. 2425

The People of the State of California,
Plaintiff and Respondent
vs.
Douglas A. Smith,
Defendant and Appellant

NOTICE OF MOTION AND MOTION FOR REHEARING AND REQUEST FOR EXTENSION OF TIME FOR APPLICATION FOR CERTIFICATION TO THE DISTRICT COURT OF APPEAL

To: The Honorable Superior Court of the State of California, in and for the County of Marin, Appellate Department; the Honorable Bruce Bales; Clerk of the Superior Court, County of Marin:

Please Take Notice that on a date to be designated by the Court, the Defendant in this matter will move the Superior Court, Appellate Department, located at the Courthouse, City of San Rafael, County of Marin, State of California, to have a rehearing in the above mentioned case. Further, the Defendant in this matter hereby applies to the Superior Court, Appellate Department, for an extension of time to apply for certification to the District Court of Appeal, that the transfer of the case to the District Court of Appeal appears necessary to secure uniformity of decision and to settle an important question of law, on the grounds that certification is necessary to resolve an apparent conflict in decisions effecting the subject matter

of this case and that the subject matter and issues of this case constitute an important question of law.

This motion and application is based upon this notice, on the papers, records, pleadings on file herein, the attached declaration of Socrates Mamakos submitted herewith, and points and authorities attached hereto, together with such other evidence, oral or documentary, as may be introduced at any hearing ordered on this motion.

Dated this 5th day of December, 1966.

SOCRATES MAMAKOS

By ROGER P. GARETY
Roger P. Garety
Attorneys for Defendant

In the Superior Court of the State of California
in and for the County of Marin
Appellate Department

No. 2425

The People of the State of California,
Plaintiff and Respondent
vs.
Douglas A. Smith,
Defendant and Appellant

DECLARATION IN SUPPORT OF RECALL OF REMITTITUR AND FOR LEAVE FOR EXTENSION OF TIME TO APPLY FOR REHEARING AND CERTIFICATION

I, Socrates Mamakos, under penalty of perjury hereby state:

1. I am the attorney for the Defendant, Douglas A. Smith, in the above mentioned action. My office is located at 1035 Russ Building, San Francisco, which address is on record with both the Municipal Court of Marin County, and the Superior Court of Marin County;

2. The above mentioned case was argued before this Court on appeal on October 18, 1966, at which time at the close of argument the Court instructed the parties that the case would stand submitted;

3. On December 1, 1966, upon return to my apartment at 2155 Scott Street, San Francisco, at 11:00 P.M., I found in my mail box a letter from George H. Gnoss, the County Clerk, which bore my name and was addressed to 2199 California Street, San Francisco, California, from which address I had moved on October 8, 1966. The envelope was postmarked November 23, 1967 (!), and had my present address penciled in for forwarding to me;

4. The envelope contained the Court Order of the Superior Court attested to on November 18, 1966, affirming the Judgment of the Municipal Court, and was my first notice, either written or oral, of the decision of the Superior Court;

5. On December 2, 1966, I telephoned the Clerk of the Superior Court to inform him of the cause of my delay in submitting a Petition for Rehearing and Application for Certification to the District Court of Appeal. The person answering informed me that a remittitur had been issued, but that the Honorable Thomas F. Keating, who happened to be at the Clerk's Office at the time, told the Clerk to instruct me to prepare proper documents, with appropriate points and authorities, for whatever further appeal I wished to take;

6. All of the documents necessary for the recall of the remittitur, the petition for rehearing, and the application for certification to the District Court of Appeal were prepared over the December 2nd weekend;

7. Rule 191, title 1, division 2, of the California Rules of Court, sub-section (d) provides as follows:

> ". . . a remittitur may be recalled by order of the Court on its own motion, or motion after notice supplied by affidavits, or on stipulation setting forth the facts which would justify the granting of a motion."

Dated this 5th day of December, 1966.

SOCRATES MAMAKOS
s/ SOCRATES MAMAKOS
Socrates Mamakos,
Attorney for Defendant

In the Superior Court of the State of California
in and for the County of Marin
Appellate Department

No. 2425

The People of the State of California,
Plaintiff and Respondent
vs.
Douglas A. Smith,
Defendant and Appellant

MEMORANDUM OF POINTS AND AUTHORITIES

I

Rule 63 of the California Rules of the Court provides that on appeal of a party the Superior Court may certify that the transfer of the case to the District Court of Appeal appears necessary to ". . . secure uniformity of decision or to settle an important question of law. . . ."

Sub-Section (b) of Rule 63 provides that ". . . such application shall be served and filed before the Judgment on appeal becomes final as to that Court and may be included in any petition for rehearing . . .

Although the Judgment of the Superior Court becomes final seven (7) days after it is pronounced pursuant to rule 107 of the California Rules of Court, it is now a well established rule in the area of appeals, that if notices are late because of justifiable reliance on official bodies, such notices shall be deemed "constructively filed" in time.

People vs. Slabodion (1947) 30 Cal2nd 362, 181 Pacific 2nd 868

Witkins, California Criminal Procedure, section 696, 697 (cases cited)

It is respectfully submitted that the facts set forth in the attached Declaration constitute a sufficient basis for holding that Defendant's motion for rehearing and application for certification is timely filed.

II

With respect to application for certification to the District Court of Appeal, there is an apparent conflict in the decision of the Appellate Department in this case and that reached in the case of *People v. Swanson* (1962) 204 Cal App2nd 169, 22 Cal Reporter 178;

Further, this case raises an important question of law relating to the doctrine of proof mentioned in *People v. Alkow* (1950) 97 Cal App2nd 794, 218 Pacific 2nd 607.

Dated this 5th day of December, 1966.

SOCRATES MAMAKOS
ROGER P. GARETY
Roger P. Garety
Attorneys for Defendant

Appellate Department
In the Superior Court of the State of California
in and for the County of Marin

No. 2425

The People of the State of California
Plaintiff and Respondent

vs.

Douglas A. Smith
Defendant and Appellant

ORDER

The motion of the Appellant for a rehearing and for extension of time for application for certification of the above entitled matter to the District Court of Appeal are hereby denied.

Concurring: Judges Thomas F. Keating, Samuel W. Gardiner, and Harold J. Haley.

Dated: December 19, 1966

THOMAS F. KEATING
Samuel W. Gardiner
Harold J. Haley